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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 10-22777-CIV-MOORE/SIMONON

NEW HOPE POWER COMPANY and
OKEFLANTA CORPORATION,

Plaintiffs,

vs.

THE UNITED STATES ARMY CORPS OF
ENGINEERS and STEVEN L. STOCKTON,
in his official capacity as Director of Civil
Works, United States Army Corps of
Engineers,

Defendants.

**ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION AND FOR SUMMARY JUDGMENT, DENYING DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court upon Plaintiffs' Motion for Preliminary Injunction
and for Summary Judgment (ECF No. 18) and Defendants' Cross-Motion for Summary
Judgment (ECF No. 27). These motions are now fully briefed.

UPON CONSIDERATION of the Motions, the Responses, the Replies, the pertinent
portions of the record and being otherwise fully advised on the premises, the Court enters the
following Order:

I. BACKGROUND

Plaintiffs in this case are Okeflanta Corporation ("Okeflanta"), a Florida sugarcane
grower, and New Hope Power Company ("New Hope"), a renewable energy company. In this
action, brought pursuant to the Administrative Procedure Act ("APA"), Plaintiffs allege that

Judge K. Michael Moore has set aside a Corps policy on prior converted cropland, saying the agency needs to engage in notice-and-comment rulemaking. Moore set aside both the Corps Jacksonville District's "Issue Paper" interpreting "Normal Circumstances" as well as a memorandum adopting the issue paper's conclusions nationally.

Click on page 1 to the right for the full decision.

"The Corps may not, without engaging in rulemaking using appropriate notice-and-comment procedures, determine the existence of wetlands in a manner inconsistent with this Order," Moore said in the Sept. 28 order (*New Hope Power Co. v. USACE*, 10-22777, S.D. Fla.).

The plaintiffs, a renewable energy company and a sugarcane grower, "allege that defendants' new rules have improperly extended the Corps' jurisdiction to situations where (1) prior converted croplands are converted to non-agricultural use; and (2) dry lands are maintained using continuous pumping. Under this new rule, wetland determinations are made based on what the property's characteristics would be if the pumping ceased. Therefore, plaintiffs seek to have the new rules set aside."

Regarding the issue paper prepared by the Jacksonville District, Moore wrote, "This paper was written in response to five pending application for jurisdictional determinations involving the transformation of prior converted cropland to limestone quarries. The Issue Paper concluded that such a transformation would be considered an "atypical situation" within the meaning of the Wetlands Manual and, thus, subject to regulation. *Id.* at 1-5. The Issue Paper further found that active management such as continuous pumping to keep out wetland conditions was not a "normal condition" within the meaning of 33 C.F.R. § 328.3(b). This Issue Paper was sent to the Corps' headquarters along with a request for guidance as to whether the Issue Paper reflected the Corps' rules. The Issue Paper was adopted as being an accurate reflection of the Corps' national position by Stockton in an Affirming Memorandum. See Memorandum for South Atlantic Division Commander (Apr. 30, 2009) (ECF No. 18-23) ("Affirming Memorandum"). No notice-and-comment period occurred before this memorandum issued. The Corps has implemented and enforced the Stockton Rules nationwide since the Affirming Memorandum issued, and the Corps has issued additional memoranda supporting this policy."

Posted by Steve Davies at 5:48 pm

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